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IN THE

Supreme Court of the United States

October Term, 1979
No. ....., and
No. .....

79-556

GWEN DAVIS MITCHELL and DOUBLEDAY AND COMPANY,

Petitioners and Defendants,

vs.

PAUL BINDRIM,

Respondent and Plaintiff.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Authors League of America; Association of American Publishers, Inc.; and Independent Literary Agents Association, Inc., in Support of Petitions for Writ of Certiorari of Petitioners and Defendants Gwen Davis Mitchell and Doubleday and Company.

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Pursuant to Rules 35 and 42(1) of the Rules of this Court, the above named *amici* respectfully file their Brief Amici Curiae herein in support of the Petitioners (Gwen Davis Mitchell and Doubleday and Company). The written consents of all parties hereto are concurrently filed with the Clerk of the Court.

Interest of Amici.

Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc. (both hereafter simply "Guild") comprise the collective bargaining agent of writers employed by producers for the purpose of preparing literary material for entertainment motion pictures, television, and radio. The Guild has collective bargaining agreements with producers of films produced for or exhibited over television and with the three major television and radio networks.

The Authors League of America, Inc., is the national society of professional authors and dramatists. Many of its members write works of fiction: novels, plays and short stories.

The Association of American Publishers, Inc. ("AAP") is a trade association whose more than three-hundred members includes most of the nation's leading book publishing firms. AAP members publish a wide range of books, including works of fiction: novels, short stories and dramatic works.

Independent Literary Agents Association, Inc. ("ILAA") is a not-for-profit membership corporation consisting of professional literary agents whose principal purpose is to protect and enhance the interests of those agents and the authors they represent. Many of the clients represented by ILAA members are authors of contemporary fiction, much of which is based on or inspired by actual persons or events.

Amici respectfully appear here to urge in behalf of writers, publishers and literary agents that society's interest in permitting the fullest freedom to literary creativity requires that Certiorari be granted by this Court and the judgment of the Court of Appeals be reversed.

Preliminary Statement and Summary of Argument.

This *amici curiae* brief is confined to First Amendment issues and brings to the Court the concerns of writers and publishers of fiction and drama.

In Amici's view, important questions are presented on two levels:

First, as a matter of constitutional law under the First Amendment, can there be liability in defamation based upon a novel which is clearly labelled to be fiction, which was and is understood by all readers to be fiction, and which does not name the plaintiff as a character but, in fact, describes the allegedly offending fictional character as physically wholly different from the plaintiff. Amici submit that there should be no liability, and that to permit liability will severely inhibit creative writers.

Second, on a procedural or evidentiary but no less important and constitutional level, and assuming that there can be liability, must plaintiff prove identification by clear or convincing evidence or only by a preponderance of the evidence. Amici submit that plaintiff must prove *every* element of his case by clear and convincing evidence, that the instruction (C 110) in this case—where plaintiff stipulated he was a public figure—was erroneous in requiring plaintiff to produce only a preponderance of the evidence, and that in any event the testimony of three insiders cannot, as a constitutional matter, support a finding for plaintiff on the issue of identification.

I

Where a Novel Does Not Utilize the Name of the Plaintiff and Describes the Allegedly Offending Fictional Character as Wholly Different in Physical Appearance and Characteristics From Plaintiff, There Can Be No Defamation Based Upon the Fictional Work. A Contrary Rule Would Impose an Intolerable Burden on Creative Writers and Publishers.

In the case at bar, the novel "Touching" deals with a nude encounter workshop. It dramatizes the dangers and underlying coarseness of some encounter therapy methods which masquerade as psychotherapy in Southern California. It describes the leader of the group, the fictional therapist, as a person "who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession." (Dissenting opinion of Presiding Justice Files, slip opinion p. 35.) The plaintiff complains that he has nevertheless been defamed and injured in his profession by the depiction of the therapist in the novel. *E.g.*, the fictional therapist uses exceedingly vulgar language and simplistic and insensitive analysis, and therefore it is contended that the plaintiff has been inaccurately described and defamed.

It is not disputed that "Touching" is a novel and that it was and is understood by all readers to be fiction. The nude encounter therapist's technique is dramatized as coarse and heavily sexually oriented and emotionally disturbing. With exceptions which are statistically of no consequence, the thousands of readers of the novel, that is, the audience for which it was intended, have never experienced nude encounter groups and do not know the names or identities of any persons,

including the therapist, who were present at the sessions which the novelist attended.

We respectfully submit that to permit an action for defamation on such a record offends the First Amendment and will stifle creativity. The work is clearly labeled a novel, a fiction, and the fictitious therapist has a name, identity and appearance all different from plaintiff's. If the novelist and her publisher here are held to answer, writers and novelists everywhere will be inhibited from drawing on their personal knowledge and insights into real persons. But that is what novelists have done from time immemorial.

Dramatic expressions, including novels and other works of fiction, and their publication are protected by the First Amendment.

> *Winters v. New York,* 333 U.S. 507, 510, 92 L.Ed. 840, 847 (1948);
>
> *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 3 L.Ed.2d 1512 (1959);
>
> *Barrows v. Municipal Court,* 1 Cal.3d 821, 83 Cal.Rptr. 819 (1970).

This Court itself has drawn no distinction between the informative function of the press and that of "novelists, academic researchers, and dramatists." *Branzburg v. Hayes,* 408 U.S. 665, 704-705, 33 L.Ed.2d 626, 653 (1972). The novelist, the film writer, the dramatist creates from observation of real persons, and unless his creations are based upon acute observation, they will fail as literature.[1]

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[1]The thought was put as follows 375 years ago by Cervantes in "Don Quixote":

> ". . . fiction is all the better the more it looks like truth, and gives the more pleasure the more probability

(This footnote is continued on next page)

Fictional characters are based in part on real persons whom the author has known or observed. Sometimes the author takes traits of several persons and combines them in one, or highlights a particular trait in a fictional character. Many famous literary characters have been based almost entirely on a single living person.[2]

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and possibility there is about it. Plots in fiction should be wedded to the understanding of the reader, and be constructed in such a way that, reconciling impossibilities, smoothing over difficulties, keeping the mind on the alert, they may surprise, interest, divert, and entertain, so that wonder and delight joined may keep pace one with the other; all which he will fail to effect who shuns verisimilitude and truth to nature, wherein lies the perfection of writing." (Part I, Ch. 47; Great Books Ed., Vol. 29, p. 184.)

[2]It is impossible to list all the novels and plays in which principal characters have been grossly based on specific persons living at the time of the publication. Here is a brief sampling of some modern works from various media:

Novels:

"Remembrance of Things Past", by Marcel Proust. The characters were based on socially prominent Parisians. Baron de Charlus is thought to have been based on Count de Montesquiou.

"Point Counter Point", by Aldous Huxley.
The leading characters were based on prominent literary figures, including Lady Ottoline.

"Cakes and Ale", by Somerset Maugham.
The old novelist Edward Driffield was based upon Thomas Hardy, just deceased at the time of publication. The young ambitious writer Alroy Kear was based on Hugh Walpole, then very much alive.

Plays:

"The Man Who Came to Dinner", by George S. Kaufman and Moss Hart. The character of Sheridan Whiteside was based on Alexander Wolcott. Harpo Marx, Noel Coward and others were thinly disguised.

"The Royal Family", by George S. Kaufman and Edna Ferber. The principal characters were widely believed to be the Barrymores.

Motion Picture:

"Citizen Kane", screenplay by Herman Mankiewicz and Orson Wells. Can anyone doubt that this was based on William Randolph Hearst?

The result below places in peril every writer who draws on his own experience and observations when writing fiction. It also places in peril writers who fictionalize current events or who base their novels on dramatic true-life incidents. The characters in such fiction will be claimed by litigants to be based on real persons even when such is not the case. Writers and publishers will inevitably be subjected to increased litigation, leading to self censorship and a restraint on creative writing and discouraging "the boldness of expression indispensable for a progressive society." (See *Kingsley International Pictures Corp. v. Regents of University of New York* (1959) 360 U.S. 684, 695, 3 L.Ed.2d 1512, 1520, Frankfurter, J., concurring.)

II

To Permit Works of Fiction to Be the Basis for Defamation Actions Places Writers and Publishers in a "Catch-22" Situation Which Will Seriously Inhibit Creativity.

To the extent that the novel follows actual happenings, it is true to life with or at least calls to mind the sessions the novelist attended. Even there, however, the book does not purport to be and is not a news account—it is still fiction and its characters are developed in the novelist's imagination as sparked by the events she witnessed. No one could contend that Dr. Herford, bearded and fat, was plaintiff Dr. Bindrim. Yet to the extent that the language of the fictional

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Television:

"Washington Behind Closed Doors", television mini-series based on a novel by John Ehrlichman. Although fiction, the work was unashamedly based upon Watergate and the real persons who were involved. Teleplay by David Rintels.

Dr. Herford differs from the language actually used by Dr. Bindrim, it is now contended that Dr. Bindrim has been libelled.

This approach is deadly to creativity. Fiction which lives and talks to us with conviction and feeling does so precisely because it is grounded in reality. The imaginative touch and the insightful fictionalized detail give it life. But the court below penalizes the writer for part of what he adds to his observations while ignoring the overwhelming parts which make the work a fiction and not a libel of plaintiff. That is, the complementary or neutral materials which correspond with plaintiff (*e.g.* leader of an encounter group) are utilized to stablish his identity as the person libelled—but this is done by disregarding the categorically different complementary or neutral materials which distinguish the fictional character from the plaintiff; *e.g.*, name, physical description, training. (To the ordinary reader, of course, the name and physical description would be determinative that Dr. Herford is not Dr. Bindrim.) The dramatized and allegedly defamatory materials are then utilized to impose liability; *e.g.*, particular obscenities and vulgarisms. (Even though in this case those vulgarities are extensions of language used by the plaintiff and utilized by the novelist to dramatize the vulgar core of the psychotherapy sessions.)

With deference, we submit that this places the novelist in a "Catch-22" situation. Professor Kalven's comment, quoted by Justice Files in his dissent, is precisely in point:

> "There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all

> appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place . . . ." Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment." 1964 The Supreme Court Review 191, 199.

A rule such as promulgated by the Court of Appeal is socially undesirable and violative of the First Amendment. It is a loose cannon on the deck of creativity.

The statements in lower court opinions are not uniform in the weight they give to differences (*e.g.*, name, age, education, physical appearance, etc.) between a fictional character and a plaintiff who claims he has been libelled. See cases gathered in *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141, 143 (4th Cir. 1969). With respect, we submit that this Court should speak to the issues raised by this case and that the proper analysis and the turnabout in libel law made by *New York Times* and its progeny require the rule we argue for.

III

Assuming That Liability May Be Permitted Based Upon a Work of Fiction, the Plaintiff Nevertheless Must Prove That the Publication Was of and Concerning Him by Clear and Convincing Evidence, and Not Merely by a Preponderance of the Evidence.

Plaintiff concededly was a public figure, and stipulated to that status.

The clear and convincing standard of proof which a public figure plaintiff must present applies to the proof that the alleged libel was published of and con-

cerning him. That issue is also a constitutional one for a reviewing court. *New York Times Co. v. Sullivan,* 376 U.S. 254, 288-289, 11 L.Ed.2d 686 (1964) is conclusive on these points, and they are required to be followed by California Courts.

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied* 429 U.S. 1062 (1977), also expressly holds that the clear and convincing standard of proof is not confined to the issue of malice. Rather, it also determines the meaning, and thus, the application of the publication to the plaintiff.

The instructions here erroneously relieved the plaintiff of his burden and require reversal. (See Plaintiff's instruction B, CT 110-111.) Further, we submit that where the publication is a mass entertainment novel published and distributed nationally in hundreds of thousands of copies, where it is clearly and unequivocally labelled and sold as fiction and not fact, proof that the alleged libel (assuming that fiction can libel at all) was of and concerning the plaintiff is not made by the testimony of three insiders.[3] Such testimony simply does not rise to the level of "clear and convincing proof" that the novelist deliberately or recklessly portrayed the plaintiff in a libellous light and that the average reader identified the character in the novel with the plaintiff.

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[3]Respondent's argument that communication of a libel to a single person is sufficient is correct—but it is misdirected. There is no issue concerning publication in this case. The novel admittedly was published and distributed nationally. The threshhold issue in this case is whether the publication was of and concerning the plaintiff, and plaintiff simply does not carry his clear and convincing burden on that issue by relying on the testimony of insiders. Stated otherwise: the understanding of two or three readers that the publication referred to plaintiff is not supportable by the rule that communication of a libel to a single person is sufficient on the issue of publication.

Conclusion.

If the opinion of the California Court of Appeal is permitted to stand, the novelist's freedom of expression will be chilled by fear of defamation actions.

The Petition for Certiorari should be granted by this Court and the judgment of the trial court should be reversed.

DATED: October 8, 1979.

Respectfully submitted,

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